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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 528

R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, LOS ANGELES DISTRICT,

Petitioner,

vs.

MONOLITH PORTLAND CEMENT CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY FOR RESPONDENT.

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The two points the Government makes in its reply brief—"factual concessions" and "mining cement"—are both based upon short quoting of the record.

1. As to "factual concessions," petitioner contends that this Court distinguished *Dragon* and other pertinent cases (including *Monolith Portland Cement Company v. United States*, 269 F.2d 629, 9 Cir., 1959) because of "factual concessions not present here" (Reply, p. 1), whereas here the record [R. 96] shows a concession which takes out of this case petitioner's entire contention concerning a "limestone" market, as quoted without dispute by respondent (Brief, p. 5, fn. 5) as follows: ". . . the sworn admission below (of peti-

tioner) that 'We know of no "limestone industry" nor any designation by it for rock of the type mined by plaintiff' [R. 96]."

2/ In its brief, respondent noted the practical point that (p. 12):

> ". . . Application of the Government's theories would mean that fire-clay fabricators who admittedly by-pass the market and engage in post-marketable fabrication, would get a depletion allowance nine times greater than those miners—like Monolith—who sell the first mineral product obtainable from their deposit (cement) which is then fabricated by concrete pipe and block manufacturers to compete with fabricated fire-clay articles."

Petitioner cited such reference as follows:

> ". . . taxpayer persistently refers to its 'deposit (cement)' (Br. 12); treats cement as a mineral which is made into concrete (id., p. 8, fn. 12, and pp. 11-12); and takes the government to task for calling its mineral 'limestone' (id., p. 5, fn. 5)."

to suggest that "In brief, taxpayer apparently contends that it mines 'cement' rather than 'limestone'." (Reply, p. 2)

In context, the parenthetical word "(cement)" plainly refers to the "mineral product"—not to the mineral deposit. And, of course, cement has always been recognized as a "mineral product" [e.g. R. 393, p. 3].[1] When taxpayer "persistently refers" to its "deposit" in its brief, the "deposit" referred to is either the "cal-

[1] And see *Dragon Cement Company v. United States*, 244 F.2d 513 at 518, 1 Cir. 1957, collating some of the many references to this effect.

cium carbonates' or 'chemical grade limestone'" the Courts below found it to be [R. 172], both of which are depletable mineral deposits, and neither "cement" *nor* "limestone."

The significance of petitioner's misstatement and its suggestion, as respondent's "contention," of a new straw man question which it then proceeds to knock down (Reply, p. 3), is that petitioner is belatedly attempting to bridge by argument the factual gap between the finding that respondent's specific type of limestone was "calcium carbonates or chemical grade limestone" [R. 172], and the Government's exclusive reliance in its Petition upon the general statistics reporting production of "limestone." (Petition, pp. 3-5.)

The determination below of the commercial and statutory identity of respondent's type of limestone was essential, since "limestone" *qua* "limestone" is not granted depletion. Instead, since different types of limestone have different commercial uses and require different pre-marketable processing, Congress provided different rates of depletion for the different types of limestone in the 1939 Code, Section 114(b)(4)(A).[2] Realizing this [R. 325-326], the Government trys to escape the conclusive effect of the finding that respondent's type of limestone is non-marketable by arguing that "In similar vein taxpayer asserts as a *fact* (Br. 4, 5), that its limestone is 'non-marketable' (although limestone is one of the most widely marketed minerals), except to the extent that it is 'salable' as cement." (Reply, p.

[2] Cf. Section 613(b)(c), Internal Revenue Code of 1954, adding "limestone" as a depletable mineral, but providing a different, lower rate for the common types of limestone used for physical purposes.

2.) This, of course, is far wide of the mark. The question is: is the type of limestone identified by the findings—the type of limestone accorded separate depletion identity by Congress—"commercially marketable"? If it is not, as the Courts below found (and the Government does not dispute),[3] the marketability of other, different types of limestone is plainly irrelevant and immaterial.

3. It is more astonishing to find that petitioner does not challenge the following points made by respondent in its brief, any one of which is sufficient to defeat petitioner's application for writ of certiorari, viz.:

a. That Congress intended that the "existing law" be available to respondent and that such law was the *Dragon* and similar cases, including the first *Monolith* case.

b. That because of the identity of the deposit, processes and market conditions in both of the *Monolith*

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[3]Petitioner argues that if there is no market for a mineral in crude form it is not entitled to any depletion by an unwarranted extrapolation (Reply, p. 2) of the language the Court used (p. 88) in *Cannelton*, when demolishing taxpayer's argument that because its high extraction costs exceeded the "going market price" it should be given an individual variance from the statutory formula. Petitioner neglects to add that on the next page the Court specifically held it unnecessary to reach such question in the cited cases, since in such cases (unlike *Cannelton*), there was *no* market (p. 89, fn. 10). Unlike the taxpayer in *Cannelton*, which attempted to corrupt the depletion allowance into a bootstrap method of making a worthless mine profitable at other taxpayers' expense, and both before and after the year involved bought the fire clay it needed in the market, the taxpayer here has operated its plant and processed its type of limestone (for which no market exists) into cement for over 40 years. Respondent's deposit *does* have economic capital "value"—as shown by such continued competitve operations through good times and bad.

case, *res judicata* and collateral estoppel apply to this case.

c. That even if by *Cannelton* this Court overturned the above-mentioned case law, in *James v. United States*, 366 U.S. 213, it reaffirmed the long established doctrine that a change of law by contrary subsequent decisions cannot be applied retroactively to the detriment of a taxpayer who relied upon such prior existing state of the law.

d. That the district court heard all of the facts upon this market point offered by both parties and decided factually that there was no market for respondent's "calcium carbonates" or its "chemical grade limestone" prior to its becoming bulk cement.

e. That no significant amount of dollars is involved.

Respondent submits that sustaining any one of these five points in its favor makes all else "unnecessary to the decision" and hence moot, if not beyond Court's jurisdiction, because of the "case or controversy" constitutional limitation governing all United States courts.

Respectfully submitted.

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Dated: December 10, 1962.